A **WIRAFLOR (MALAYSIA) SDN BHD**

v.

BIO SCIENCE CAPITAL SDN BHD

B HIGH COURT MALAYA, KUALA LUMPUR
VARGHESE GEORGE JC
[COMPANIES WINDING-UP NO: D-28 NCC-415-2010]
13 JULY 2010

C ***COMPANY LAW:*** *Winding up - Insolvency - Whether company insolvent - Whether petitioner may prosecute winding up petition notwithstanding tendering of settlement payment by company after presenting of petition - Failure by company to comply with notice under s. 218, Companies Act 1965 - Rebuttable presumption of insolvency -*
D *Onus on company to rebut presumption*

COMPANY LAW: *Winding up - Liquidation - Appointment of provisional liquidator - When can power to appoint provisional liquidator be exercised - Threshold test for appointment of provisional liquidator -*
E *Whether principal criteria for appointment of provisional liquidator pending hearing of winding up petition had been met*

COMPANY LAW: *Winding up - Petition - Whether petitioner may prosecute winding up petition notwithstanding tendering of settlement payment by company after presenting of petition - Whether company*
F *unable to pay debts - Whether statutory demand must be issued in all cases where s. 218(1)(e) is relied on as sole ground for presenting winding up petition - Companies Act 1965, s. 218*

The following three interlocutory applications were heard together:
G (i) application of the petitioner (Wiraflor) to appoint a Provisional Liquidator pursuant to s. 231 of the Company Act 1965 pending the making of the winding-up order (encl. 5); (ii) similar application to appoint a Provisional Liquidator by one Rohani, who had filed a notice of intention to appear on the hearing of the petition to
H support the said petition (encl. 16); and (iii) application by the respondent (Bio Science) and its two Directors to strike out the winding-up petition (encl. 20). Bio Science asserted that: (a) Wiraflor and Rohani were not creditors of Bio Science and they were not competent parties to seek the appointment of a
I Provisional Liquidator, much less bring a winding-up petition

against Bio Science; and (b) Bio Science was a 'solvent' company and the winding-up petition presented by Wiraflor (or Rohani) was therefore an abuse of the process of court as the Petition was ultimately bound to fail. Wiraflor and Rohani claimed that based on the disclosed overall liability and assets of Bio Science, the inescapable conclusion was that Bio Science was 'insolvent' and continued to be insolvent. The High Court in another proceeding namely Suit No. D22 NCC-1038-2010 between Bio Science and Affin Bank, had ordered an immediate cessation of the Receivership and the discharge of the Receiver and Manager's control over the assets and affairs of Bio Science. In yet another proceeding, Suit D22 NCC-178-2010, wherein the parties were Hasjuara and Bio Science, a consent judgment had been entered wherein Bio Science through the Receiver and Manager was to release from the surplus proceeds, a sum of money to the Hasjuara to settle Hasjuara's claim and also amounts owed to various others subcontractors and consultants, one of whom was Wiraflor. Hasjuara had received from the Receiver and Manager the payment of the said sum after the commencement of the winding-up petition. The main issues arising for determination were: (i) was Wiraflor a 'creditor' of Bio Science and still continued to be a 'creditor' notwithstanding the tendering (after the filing of the winding-up petition) of the cheque for RM466,632.75 for purposes of settlement of Wiraflor's claim?; (ii) was Rohani a 'creditor' of the Bio Science?; (iii) was Bio Science a 'solvent' company?; and (iv) must a statutory demand (s. 218(2)(a)) be necessarily issued in all cases where s. 218(1)(e) (that is, 'the company is unable to pay it debts') is relied on as the sole ground for presenting the winding-up petition?

Held (dismissing Bio Science's application to strike out the winding-up petition (encl. 20); and allowing Wiraflor's application to appoint a provisional liquidator (encl. 5)):

(1) Wiraflor's petition relied on the presumption of Bio Science being unable to pay its debt as allowed under s. 218(2)(a). The consequence in law, once a presumption of being unable to pay its debt arose against the company, was that the burden shifted to Bio Science to prove that it is solvent to avoid a winding-up order being granted. (para 9)

(2) Based on the admission by Bio Science in the 'List of Creditors at 12 June 2009' of Wiraflor as creditor, Wiraflor was clearly entitled in law to file the petition to wind-up Bio Science. The mere fact of the offer of payment or tendering of a cheque to settle the monies due to Wiraflor after the presentation of the winding up petition did not take away Wiraflor's right in law to prosecute further the petition. (para 10)

(3) Rohani was also listed as one of Bio Science's creditors in respect of a partially settled loan of RM7,000,000, with the balance unpaid and outstanding shown to be RM6,500,000 in the 'List of Creditors at 12 June 2010'. Rohani was a creditor of Bio Science and she had a right to present a separate winding-up petition. (paras 32 & 33)

(4) In the case of Rohani, there was no formal demand issued. There was no doubt that there existed a 'debtor-creditor' relationship as between Bio Science and Rohani and that Bio Science was an insolvent company. The winding-up court can find a company unable to pay its debt from the circumstances of the case and not necessarily just because a statutory notice served pursuant to s. 218(2)(a) remains unanswered. (paras 52 & 53)

(5) The power to appoint can be exercised any time after presentation of a winding-up petition based on the degree of urgency established by the petitioning creditor and also having regard to the balance of convenience namely to maintain the *status quo* and prevent prejudice to contesting parties. The need to protect assets (or what is remaining of it) of the company pending the making of the winding up order has also been established. The threshold test for appointment of provisional liquidator is that the court must be satisfied that 'ultimately the court is likely to make the winding-up order' sought for in the petition. All these principal criteria had been met. (paras 59 & 60)

(6) Wiraflor's and Rohani's application was not brought for any collateral purpose or to put pressure for settlement of their debts. There was demonstrated in the said applications a genuine concern for the overall body of creditors and for a proper and orderly conduct of the disbursement of the

remaining assets of Bio Science after the exit of the Receiver and Manager. On the totality of the evidence, a Provisional Liquidator ought to be appointed pending hearing of the winding-up petition. (paras 65 & 66)

Case(s) referred to:

CCM Chemicals Sdn Bhd v. Urethane Technologies Sdn Bhd [2007] 10 CLJ 89 HC ***(refd)***

Emporium Jaya (Bentong) Sdn Bhd (In Liquidation) v. Emporium Jaya (Jerantut) Sdn Bhd [2002] 3 CLJ 10 HC ***(refd)***

Hongkong And Shanghai Banking Corporation Ltd v. Kemajuan Bersatu Enterprise Sdn Bhd [1992] 1 LNS 26 HC ***(refd)***

Imbangan Utama Sdn Bhd v. Lotan Engineering Works Sdn Bhd [2002] 8 CLJ 497 HC ***(refd)***

Re Great Eastern Hotel (Pte) Ltd [1988] 1 LNS 198 HC ***(refd)***

Savant-Asia Sdn Bhd v. Sunway PMI-Pile Construction Sdn Bhd [2008] 6 CLJ 681 FC ***(refd)***

Sri Hartamas DVPT Sdn Bhd v. MBF Finance Bhd [1992] 1 CLJ 637; [1992] 1 CLJ (Rep) 303 SC ***(refd)***

Teck Yow Brothers Hand-Bag Trading Co v. Maharani Supermarket Sdn Bhd [1989] 1 CLJ 258; [1989] 2 CLJ (Rep) 555 HC ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 218(1)(e), (2)(a), (b), (c), 219, 223, 231
Companies (Winding-Up) Rules 1972, r. 35
Rules of the High Court 1980, O. 18 r. 19

For the petitioner - Khabir Dhillon; M/s Khabir Dhillon
For the supporting creditor - Dato' David Morais (Mark Lau with him); M/s Sreenevasan Young
For the receivers and managers - S Kalikumari; M/s Jaafar Menon
For the respondent - Joy Appukuttan; M/s SK Yeoh & Partners

Reported by Amutha Suppayah

JUDGMENT

Varghese George JC:

[1] On 15 June 2010, I heard simultaneously three interlocutory applications in this winding-up petition. There were:

(i) Enclosure 5 as amended:

This was an application of the petitioner (Wiraflor) to appoint a provisional liquidator pursuant to s. 231 of the Companies Act 1965 pending the making of the winding-up order;

(ii) Enclosure 16:

This was a similar application to appoint a provisional liquidator by one Puan Rohani Rasid (Rohani), who had filed a notice (encl. 9) of intention to appear on the hearing of the petition to support the said petition; and

(iii) Enclosure 20:

An application by the respondent (Bio Science) and its two directors to strike out the winding-up petition.

There was another application, namely encl. 10, also before the court. This was an application by Rohani to be substituted as the petitioner in this winding-up proceeding in the event Wiraflor withdrew or was struck out as the petitioner. Enclosure 10 was however stood down by consent.

[2] The three applications (encl. 5 (as amended), encl. 6 and encl. 20) were taken together as the arguments of the respective parties centered around two principal issues which were common in the said applications. Bio Science in their application to strike out the petition, on the one hand, asserted that:

(i) Wiraflor and Rohani were not creditors of Bio Science and even separately they were not competent parties to seek the appointment of a provisional liquidator, much less bring a winding-up petition against Bio Science, and

(ii) Bio Science was a 'solvent' company and the winding-up petition presented by Wiraflor (or for that matter even if Rohani was substituted as the petitioner) was therefore an abuse of the process of courts as the petition was ultimately bound to fail.

Wiraflor and Rohani on the other hand, vehemently argued that they were indeed creditors and had *locus standi* to maintain the winding-up petition against Bio Science. It was also urged upon the court by Wiraflor and Rohani that in any event on balancing the disclosed overall liability and assets of Bio Science, the inescapable conclusion was that Bio Science was 'insolvent' and continued to be insolvent.

[3] Suffice it for me at the outset to just say that this is not a 'run of the mill' or a regular winding-up petition-situation, wherein there surface an application for a provisional liquidator to be appointed pending the making of the winding-up order. There had been a chain of events and various court proceedings where (i) Bio Science, (ii) Bio Science's major shareholder, one Globe Health Capital Sdn Bhd (Global Health), (iii) Hasjuara (M) Sdn Bhd (Hasjuara), a major creditor of Bio Science (which company was also the main contractor of a hospital building), and (iv) the receiver and manager appointed by Affin Bank Berhad (a secured creditor of Bio Science) have all been involved in some manner as parties in different courts in respect of the affairs of Bio Science, preceding this petition commenced by Wiraflor. These applications before me had therefore to be treated in the context of the peculiar set of facts and antecedent events revolving around Bio Science and not in isolation or separate from the developments there.

[4] However directly pertinent to the present applications were the following proceedings:

(a) the High Court, in another proceeding namely Suit No. D22 NCC-1038-2010 between Bio Science (and its two directors) as the plaintiff, and Affin Bank and the receiver and manager (appointed by the said bank) as the defendants, had on 9 June 2010 ordered in effect an immediate cessation of the receivership and the discharge of the receiver and manager's control over the assets and affairs of Bio Science. Further, subject to certain procedural steps to be complied with by the directors of the Bio Science, the court there had also ordered that certain surplus of proceeds derived from the sale of the secured asset and held by the receiver and manager was to be handed by the receiver and manager to Bio Science. The receiver and manager was also to thereafter cease involvement with or from interfering in the affairs of Bio Science.

(b) In yet another proceeding, Suit D22 NCC-178-2010, wherein the parties were Hasjuara and Bio Science (represented there by the receiver and manager) - a consent judgment had been entered wherein Bio Science through the receiver and manager was to release from the surplus proceeds held by the said receiver and manager a sum of money to the Hasjuara to

A settle Hasjuara's claim and also amounts owed to various others subcontractors and consultants, one of whom was Wiraflor. Hasjuara had on 7 June 2010 through their solicitors tendered to solicitors for Wiraflor a sum of RM466,632.75, the claimed debt on which this petition of Wiraflor is grounded. It B is not in dispute that Hasjuara or their solicitors had received from the receiver and manager the payment of the said sum (ie, pursuant to the terms of the consent judgment) only on 4 June 2010, that is, a date after the commencement of this winding-up petition. This petition was filed on 1 June 2010.

C Neither Wiraflor and Rohani were parties to the proceedings in D22-1038-2010, (or for that matter in the proceedings D22NCC-178-2010), and neither had been afforded a right to be heard in those proceedings in any case.

D **[5]** After having given due consideration to the evidence before me on affidavits and all the submissions made and authorities cited by the respective counsel for the parties, my decision delivered on the said applications were as follows:

E (a) On encl. 20 -

Bio Science's application to strike out the winding-up petition was dismissed.

F (b) On encl. 5 (as amended) -

I allowed the said application of Wiraflor in principle with term of the orders to be finalized.

(c) On encl. 16 -

G I made no orders on the prayers therein of Rohani as they would be met in the orders I was to make under encl. 5 (as amended).

[6] I then read out the broad grounds for my decision and H reserved my right to elaborate on the same and to also discuss in greater detail aspects of the respective submissions and/or the authorities cited, should it become necessary to issue a full written decision.

I **[7]** Parameters of the law.

Distilled from the various cases on point cited to me, (including *Re Great Eastern Hotel (Pte) Ltd* [1988] 1 LNS 198, *Sri Hartamas DVPT Sdn Bhd v. MBF Finance Bhd* [1992] 1 CLJ 637; [1992] 1 CLJ (Rep) 303, *Emporium Jaya (Bentong) Sdn Bhd (In Liquidation) v. Emporium Jaya (Jerantut) Sdn Bhd* [2002] 3 CLJ 10, *Hongkong And Shanghai Banking Corporation Ltd v. Kemajuan Bersatu Enterprise Sdn Bhd* [1992] 1 LNS 26), *CCM Chemicals Sdn Bhd v. Urethane Technologies Sdn Bhd* [2007] 10 CLJ 89) the following principles or propositions of law were in the forefront of mind when I considered the issues, both legal and factual, in determining these applications.

(a) Although the Rules of the High Court 1980 O. 18 r. 19 does not *per se* apply to winding-up petitions, nevertheless on the strength of the numerous decided authorities, this court had inherent jurisdiction to strike out a petition that amounted to an abuse of the process of court. It would be an abuse of the process of the court to resort to a winding-up action for a collateral purpose, like where it is obvious that it is brought to exert pressure to obtain payment of a disputed debt, or to embarrass or injure the credit of a company which is of sound financial standing.

Before the winding-up petition is struck out it must be shown to have been motivated by *mala fide* and/or was a frivolous and vexatious one.

(b) Section 231 of the Companies Act 1965, read together with r. 35 of the Winding-Up Rules, allow the court on an application by any 'creditor' or 'contributory', to appoint at any time after the presentation of the petition, the official receiver or an approved liquidator to provisionally be the liquidator (provisional liquidator) during the interim time before the making of a winding-up order. This was a discretionary remedy primarily vested in a winding-up court to maintain the *status quo*, preserve assets and to prevent prejudice as between contesting parties.

The applicants for the appointment of the provisional liquidator must show a 'good *prima facie* case'. The judge could refuse the application if the petition is ultimately unlikely to be granted or if there is no evidence to justify fears that the assets of the company are likely to be dissipated or monies siphoned off improperly in the meanwhile, pending the making of the winding-up order.

A The court is also required to weigh the urgency and the need for such appointment in the broader interest of the company or its creditors or contributories.

(c) A winding-up court, once seized of a winding-up petition
B before it, has to give due regard to the fact that the winding-up petition is a proceedings *in rem* (as opposed to a proceeding *in personam*) and at the forefront of its consideration should be the interest of the general and wider body of creditors, as is known or discernible on evidence
C before it.

(d) The test to be applied to determine whether a company is insolvent is the 'commercial insolvency' test ie, the company is unable to meet current debts as they fall due
D notwithstanding that it has substantial locked up wealth which cannot be immediately realized.

[8] In my assessment these applications bring to the fore, four questions that need be deliberated upon in the context of the peculiar facts of this case. Simply or generally, stated they were:
E

(i) Was Wiraflor a 'creditor' of Bio Science and still continued to be a 'creditor' notwithstanding the tendering (after the filing of the winding-up petition) of the cheque for RM466,632.75 for purposes of settlement of Wiraflor's claim?
F

(ii) Was Rohani a 'creditor' of the Bio Science?

(iii) Was Bio Science a 'solvent' company?

(iv) Must a statutory demand (s. 218(2)(a)) be necessarily issued
G in all cases where s. 218(1)(e) (that is, 'the company is unable to pay it debts') is relied on as the sole ground for presenting the winding-up petition?

[9] However before I address in detail each of the aforesaid
H questions, I need to make some comments on two material aspects that arise from the facts before me, in this instant case.

[9.1] The first is that, Wiraflor's petition relies on the presumption of Bio Science being unable to pay its debt as allowed under s. 218(2)(a). Here Wiraflor had delivered a
I statutory demand on Bio Science on 7 May 2010. Bio

Science had not within the 21 days allowed for therein, that is, on or before 28 May 2010, paid or secured or compounded to the satisfaction of Wiraflor the sum claimed. A

The consequence in law, once a presumption of being unable to pay its debt arises against the company (as was the case here says Wiraflor), is that the burden shifts onto Bio Science to prove that it is solvent to avoid a winding-up order being granted to the petitioner. B

[9.2] The second aspect is centered on a document over which much had been ventilated by the respective counsel as to its nature and effect. This is the document titled 'list of creditors @ 12 June 2009' found at p. 214 and 215 of encl. 2 (the affidavit verifying petition affirmed on behalf of Wiraflor in this petition). The 'list of creditor's @ 12 June 2009' first saw the light of day in one of the related proceedings alluded to above, namely in a Winding-Up Petition No. D28-584-2009. This was a petition which had been initiated by Hasjuara against Bio Science as a "compulsory creditors winding-up petition". At some point in that winding-up proceeding, Global Health (who was and still is a majority shareholder of Bio Science) applied for leave to 'resolve' rather for a 'creditors voluntary winding-up' of Bio Science on the premise that there was available sufficient funds or assets to meet all debts of Bio Science. Global Health's application was supported by an affidavit (titled 'main shareholder's 1st affidavit) affirmed by one Senthil Vaasan Kayvalyan, a Director of Global Health where *inter alia* it was averred to the following effect: C D E F G

(i) That the Bio Science's principal business activity was the construction, development and intended operation of a specialist neurology and cardiac hospital;

(ii) Bio Science had encountered financial constraints and banking facilities they had, proved to be insufficient; H

(iii) Bio Science were (then) in negotiations with Sime Darby Healthcare for the latter to purchase the hospital and the indicative offer price was RM150 million; I

(iv) A receiver and manager had been appointed by Affin Bank (the secured creditor of Bio Science) and the receiver and manager had embarked on a process to sell the land and the partly completed hospital building by a tender exercise;

(v) It was anticipated that there would be excess of proceeds from the sale of the secured property sufficient to meet and discharge all liabilities of Bio Science.

To this affidavit was annexed the said 'list of creditors @ 12 June 2009' as exh. C13. The deponent's averment at para. 24 of the affidavit was to this effect - " ... so as **to achieve a suitable return for all general creditors estimated** (including advances of RM29,417,299.51 from the main shareholder) in the region of RM54,883,517" (emphasis added)

[10] In the 'list of creditors @ 12 June 2009' at item 25 thereof, Wiraflor was listed as one of the 'creditors' of Bio Science' for the 'invoiced amount' at RM555,239 with a 'balance unpaid' identified as RM455,239. At item 69 of the same list - Rohani is in turn listed as also one of the 'creditors' of Bio Science for a 'loan' of RM7,000,000 with the 'balance unpaid' stated to be RM6,500,000.

[11] Wiraflor and Rohani argue that this reference to them in the 'list of creditors @ 12 June 2009' amounts to an admission sufficient to confirm in their favour their status as one among the many 'creditors' of Bio Science. Bio Science on the other hand contends that the list was prepared without reference to or assistance of all relevant books and papers (which were then, allegedly, in the possession of the receiver and manager) and in any event, it was merely a 'working paper' or 'provisional list' and therefore not conclusive of Wiraflor's and Rohani's position as 'creditors' of Bio Science. (See: encl. 25 – affidavit of Datuk Ahmad at para 10.4). It was also contended for Bio Science that the mere mention of the two names (Wiraflor and Rohani) amongst others there in the list did not make them 'creditors' in any event and the court ought to embark upon some further examination before concluding that Wiraflor and/or Rohani had the *locus standi* to pursue the petition to Wind-Up Bio Science.

[12] I am not persuaded by the argument of counsel for Bio Science that I should hold the 'list of 'creditors @ 12 June 2009' to be only a working paper and not a complete or binding list of 'creditors' of Bio Science. I hold so because:

(i) I have no doubt in my mind that 'list of creditors @ 12 June 2009' emanated from some responsible person in Bio Science itself; and

ii) it was relied upon and used by a responsible member of Bio Science's major shareholder, that too in a court proceedings to support the claim that those named were all the known 'creditors' of Bio Science as of 12 June 2009 and that Bio Science was able to meet and discharge the liability of Bio Science to each of the said creditors respectively;

(iii) The 'list of creditors @ 12 June 2009' also contained all the material details and the respective relationship under which monies became or were due from Bio Science to the various named persons. In the case of Wiraflor it was described as a 'subcontractor' (of a 'main contractor') and in the case of Rohani, the outstanding due to Rohani was expressed to have arisen in respect of a 'loan' transaction. These details were consistent with the evidence of the respective contexts pursuant to which Wiraflor and Rohani were claiming monies from Bio Science.

(iv) What more, by way of confirmation of the Bio Science's liability to those listed there as creditors of Bio Science, we have also on evidence specifically in the case of Wiraflor, the fact of a payment from Bio Science, *albeit* through Hasjuara, for the stated amount (or thereabouts) as was listed and identified in the 'list of creditors @ 12 June 2009' as due from Bio Science to Wiraflor.

[13] Bio Science does not contest at all the existence of the 'list of creditors @ 12 June 2009' nor the purpose for which it was drawn up and adduced in court. I read *Imbangan Utama Sdn Bhd v. Lotan Engineering Works Sdn Bhd* [2002] 8 CLJ 497, to be wide enough to support the proposition that an acknowledgement of indebtedness can ground a petition to wind up a company if the acknowledgement can be shown to have emanated from a responsible officer of the company or persons in the know or

A related to the affairs of the company in question. In this case before me, there is no allegation of *non est factum* in respect of the 'list of creditors @ 12 June 2009' by Bio Science at all.

[14] I therefore hold that Bio Science has no cogent grounds to B resile from what the 'list of creditors @ 12 June 2009' is all about, namely a list of Bio Science's creditors as on 12 June 2009 as expressly titled and stated there. The word 'estimated' after the words 'general creditors', in a reasonable reading of para. 24 of Senthil's affidavit referred above, in my view, was only qualifying C or reserving the non-conclusiveness or the correctness of the quantum or amounts stated or denoted as owing to each of the named individual or entities in that list and not of the persons or entities so named as creditors. It is my finding that each of such person or entities listed there had a claim directly or indirectly on D monies of Bio Science then/or in the future and Bio Science did knowingly and willingly acknowledge that to be the case.

[15] Taking the two aspects addressed by me above, it is clear that the burden was on Bio Science to satisfy this court that Bio E Science was a 'solvent' company and this winding-up petition was bound to ultimately fail.

[16] I now address the questions I posed earlier.

[17] Was Wiraflor a 'creditor' of Bio Science? Did Wiraflor have F locus standi to commence this winding-up petition in this court?

[18] I agree that this has to be firstly decided as at the date when this petition was filed, that is, on 1 June 2010 and then, whether subsequent to that date there had been any change to G that position of Wiraflor?

[19] As discussed earlier in this decision, based on the admission by Bio Science in the 'list of creditors @ 12 June 2009' of Wiraflor as creditor, I accept that Wiraflor was clearly entitled in law on 1 June 2010 to file the instant petition to wind-up Bio H Science.

[20] Bio Science however contended that Wiraflor was not a direct 'creditor' of Bio Science as Wiraflor was only a subcontractor involved in the hospital construction project. They I further say that Wiraflor, if at all, only had a privity of contract with Hasjuara and not Bio Science.

[21] I do not agree with the distinction attempted to be drawn here on that basis by counsel for Bio Science. It must be recalled that there had been supervening events that had made Bio Science directly liable to meet the claims of Wiraflor, namely:

(i) the admission in the 'list of creditors @ 12 June 2009' following obviously a default in payment by Bio Science on the construction project when Bio Science failed to pay Hasjuara, the main contractor of the project, and this followed by,

(ii) the consent judgment entered in the suit D22NCC-178-2010 on 18 May 2010 (where although the parties were Hasjuara and Bio Science (by receiver and manager)), Wiraflor was acknowledged as one of the person who were to receive part of the payment to be released to or through Hasjuara from the excess of proceeds of sale of the assets of Bio Science.

[22] There was existence in this case, in my assessment, an undeniable admission that Wiraflor is a direct creditor of Bio Science for all intents and purposes. Even if, Wiraflor was not a party to a written contract with Bio Science, the supervening scenario definitely evidences a situation where Bio Science becomes directly answerable to Wiraflor to be paid from the monies that should flow from the excess of proceeds standing after disposal of Bio Science's secured property, namely the hospital building.

[23] The consent judgment of 18 May 2010 had been entered into with the leave of court by the receiver and manager and still remained binding on Bio Science since it had not been set aside. It is rather an artificial argument then for the directors of Bio Science to now say or contend that the receiver and manager did not have authority to proceed as they did to record the consent judgment. The receiver and manager had sufficient basis to affirm the liability of Bio Science, direct or indirect, to Hasjuara and the other parties named as beneficiaries to the monies to be released per the terms of the consent judgment. In the context of a construction-contract a direct liability to pay between employer and subcontractors is a fact that may be deduced from the conduct of the parties in any event. This could be clearly concluded here to be the case from the events subsequent to the appointment of the receiver and manager.

[24] Even if I am wrong, I hold that the 'lists of creditors @ 12 June 2009', for the reasons already stated by me earlier, is sufficient in itself, to impose a direct liability on Bio Science to pay Wiraflor and thereby confer on Wiraflor the status of being a creditor of Bio Science at the time of the filing of this winding-up petition.

[25] Has this changed? As commented earlier, there was a cheque for RM446,632.75 received by Wiraflor's solicitors on 7 June 2010 through solicitors for Hasjuara, ie, after the petition here was presented. The monies for the cheque (coming from the surplus proceeds from the sale of Bio Science's secured property which sum had been retained in the hands of the receiver and manager) was Bio Science's money or asset at that time. The release of the payment to Hasjuara by receiver and manager was effected only on 4 June 2010 that is, also a date after the presentation of instant winding-up petition.

[26] Counsel for Wiraflor has not encashed the cheque to date. I find that there is merit in counsel for Wiraflor's contention that such a payment out from or any disposition of the property (funds included) of Bio Science once a winding-up petition has been presented against it could be open to challenge and stood the risk of being declared as a void payment. (s. 223 of Companies Act).

[27] The Federal Court in *Savant-Asia Sdn Bhd v. Sunway PMI-Pile Construction Sdn Bhd* [2008] 6 CLJ 681 has emphatically held that irrespective of whether a winding-up order is eventually made or not, the protection granted to the class of creditors of a company against which a winding up petition has been filed, comes into effect from the date of presentation of the winding-up petition. (Section 219 of the Companies Act, 1965). The likelihood of Wiraflor being called to account for the same by the Liquidator in the event Bio Science is subsequently wound-up is a definite likelihood and the legal consequence highlighted by counsel for the petitioner, should be anticipated and recognised.

[28] Understandably, so as not to risk a claim by a subsequently appointed liquidator (at the behest of Wiraflor or some other creditor), the tender or offer of the cheque has not been accepted by/or for Wiraflor on legal advice. On that count, I hold that there is and ought not to be any change to the status or position of Wiraflor as a 'creditor' of Bio Science. The mere fact of the

offer of payment or tendering of a cheque to settle the monies due to Wiraflor after the presentation of the winding up petition does not take away Wiraflor's right in law to prosecute further this petition.

[29] There is no doubt in law that once a petition to wind-up has been presented, it sets in motion several serious legal consequences amongst which is the paramount interest of the general body of 'creditors' of the company sought to be wound up. I would venture to add that a petitioner (who can only withdraw a petition or discontinue the petition at the hearing of the petition with the leave of the court), has the added responsibility to give due and foremost consideration to the interest of the general body of 'creditors' known or unknown, especially of those within the class of unsecured 'creditors' whose claims ultimately would rank *pari passu* to whatever balance of proceeds available when the company is liquidated. In this case, the 'list of creditors @ 12 June 2010' of Bio Science listed many names and it has not been shown how their claims against Bio Science has been settled (if at all) or otherwise safeguarded.

[30] In the fact scenario before me, I therefore conclude that Wiraflor was a 'creditor' entitled to commence this winding-up petition and further that Wiraflor continued to be one at the time of the hearing of these applications, notwithstanding the attempt towards settlement of the monies due to Wiraflor (which had been justifiably rebuffed by Wiraflor in any event).

[31] The next question that need be addressed is - Was Rohani a 'creditor' of the Bio Science?

[32] Similarly as in the case of Wiraflor, Rohani is listed as one of Bio Science's creditors in respect of a partially settled loan of RM7,000,000, with the balance unpaid and outstanding shown to be RM6,500,000 in the 'list of 'creditors' @ 12 June 2010' at item 69 thereof. The effect of such an acknowledgment of debt has been commented upon by me earlier (when considering Wiraflor's status) and applies equally in the case of Rohani as well.

[33] Further, by the time these applications came up for hearing, Rohani had by way of a further affidavit (encl. 26) adduced documents which go to show the source and movement of the monies advanced directly to Bio Science from or through her,

which allegedly constituted the said loan-sum. The intermediary on behalf of Bio Science, it must be noted here, in the related arrangements appear to be one Muralee D Menon, who as the records show, was at all material times one of the two directors of Bio Science.

[34] In my assessment, for present purposes, it is not material whether the monies for the loan came from Tun Daim or whether Rohani was a front or proxy for Tun Daim, for those monies advanced. Rohani had by letter of 9 November 2009 notified the receiver and manager of Bio Science of her claim as a 'creditor' and of the amount outstanding and due to her to enable the receiver and manager to take steps to protect her interest and as she also said, to 'claim my money back'. On 19 April 2010, Rohani also wrote to Mr Muralee Menon in respect of the subject of the 'friendly loan' (see affidavit of Rohani affirmed on 7 June 2010 encl. 13 @ pp. 316 to 319).

[35] It is of significance that in the affidavit of Datuk Ahmad b Abd Talib, affirmed on 13 June 2010, (encl. 25), wherein the deponent specifically affirmed the said affidavit also on behalf of Muralee D Menon, there is no denial of the loan or the position of Rohani as a 'creditor' or any explanation to contradict Rohani's claim. The silence of Muralee Menon to the assertion of loan by Rohani made through him to Bio Science and the circumstances surrounding the same, speaks volumes against Bio Science's denial that there was such a loan at all.

[36] I hold that Rohani is a creditor of Bio Science and she did have a right to present a separate winding-up petition, that is on the date when this petition was filed, namely on 1 June 2010. Should I be wrong on my earlier finding that Wiraflor is a 'creditor' of Bio Science, then Rohani definitely and surely does qualify to step into the position of the petitioner in this very same petition and be substituted as the petitioner in the place of Wiraflor. I did not however on the basis of my decision in respect of Wiraflor's encl. 5 as earlier stated, have to make such an order.

[37] To me there is no disputing the fact of the indebtedness of Bio Science to Wiraflor and to Rohani from the assets of Bio Science or of what remains of it, namely, their claim to be paid from the excess of proceeds in the hands of the receiver and manager in settlement of monies owing to them.

[38] I come to the third question I posed. Was Bio Science a 'solvent' company? A

[39] The facts show, that the sole assets of Bio Science, was the hospital which was sold for RM134 million. The secured creditor, Affin Bank, through the Receiver and Manager appointed by them, were able to realize a sum of RM98.5 million from that proceeds of sale in discharge of their secured debt. The balance of the sale proceeds thereafter amounted to RM35.5 million from which it is now known that a sum of RM9.9 million has since been paid to Hasjuara pursuant to the terms of the consent judgment of 18 May 2010. B C

[40] The balance of proceeds therefore available and undisbursed would be about RM25.5 million (or thereabouts), and this was with or retained by the receiver and manager at the time of the hearing of the applications. D

[41] Even if an amount up to RM9.9 million had been settled out of the total debts in the 'list of creditors @ 12 June 2009' there would still be outstanding, sums payable by Bio Science to the other declared and admitted creditors of Bio Science there in the list a sum to the tune of about RM20.9 million still. E

[42] However a crucial factor to bear in mind in any calculation as to the total outstanding liabilities of Bio Science is that, there is admittedly a further debt of RM29.4 million (or so) declared as owing by Bio Science to its Holding Company (or as elsewhere referred as 'advances' made to Bio Science by its main shareholder or holding company). This sum together with RM20.4 million still due to the admitted creditors would bring the total liabilities of Bio Science to RM50.3 million, that is exceeding the balance of proceeds available of RM25.5 million. F G

[43] There is however some dispute to whether such a sum owing to the major shareholder is in the first place existent as reflected in the Audited Accounts of Bio Science for the year ending 2008. The receiver and manager have expressed reservations on the existence of such an 'advance' by shareholder as no supporting papers for this alleged claim were available to them. Counsel for Wiraflor, on the other hand, has highlighted from the said 2008 Audited Accounts of Bio Science, that there H I

was some sudden surge of large amounts evident from the comparative figures for the years 2007 and 2008 and went on to suggest that there was something suspicious in respect of this debt stated to owed by Bio Science to its main shareholder. Be that as it may, it is not for this court to check on the veracity of the same. Bio Science by their directors still insist that this amount continues to be due and payable as a debt of Bio Science but state however that the main shareholder is willing to defer a claim to be immediately paid that alleged sum. (See encl. 25 para 16 - affidavit of Datuk Ahmad b Abd Talib).

[44] Counsel for Bio Science maintained that the main shareholder or holding company of Bio Science is entitled to postpone the recovery of their claim if they chose to. Counsel did however agree that if and only if repayment of the shareholders advances are deferred or postponed would there arise a situation of excess proceeds or sufficient assets available to meet all outstanding liabilities of Bio Science and not when this monies owing to the shareholder is included or taken into account when calculating the total liabilities of Bio Science. The monies owed to the main shareholder or holding company, it was conceded, was a current unsecured liability of Bio Science and according to counsel for Bio Science the shareholder was not waiving their claim to that sum.

[45] Counsel for Wiraflor argued that agreement to defer or postpone a repayment does not amount to a waiver of the sum due to the main shareholder a creditor of Bio Science. So long as the amounts remain owing by Bio Science, applying the bottom line test of balancing of assets and liabilities of the company, Bio Science was 'insolvent' ie, unable to meet its current liabilities.

[46] We also do not know whether which of the others recognised as creditors of Bio Science in the 'list of creditors @ 12 June 2009' have been individually settled and whether there are other persons or other unlisted creditors of Bio Science who might surface in due course. It is to be noted that in encl. 25, the deponent of the affidavit, Datuk Ahmad b Abd Talib (at para 13.10), himself makes reference to '*bona fide* unsecured creditors, ex-staff and shareholders' of Bio Science. While it is true that presently no such other person have come forward to support this petition, it must be pointed out that this petition has yet to be

advertised. Such a development cannot therefore be easily dismissed as the petition here is only fixed for hearing on 2 September 2010. A

[47] Is there any basis then for the court to hold that Bio Science is 'solvent'? To the contrary, it is my finding that the facts are overwhelmingly stacked against Bio Science and the undeniable conclusion is that Bio Science is 'insolvent', particularly taking into account as a current and existing debt of Bio Science, the sum owed to its shareholder/holding company which amount still remain on the books. The total available funds are not sufficient to meet all liabilities. The whole body of creditors has to be protected and the balance from the surplus of proceeds of sale in the hands of the receiver and manager is definitely not sufficient to meet all liabilities of Bio Science, as have been shown to the court by both Wiraflor and Rohani. B C D

[48] With the 'shareholders advance' looming there still in the horizon without being waived totally by the relevant party, Bio Science cannot by any stretch or argument persuade this court that Bio Science is today 'solvent'. I hold that the second, if not both the tests, as postulated by Grimberg JC in *Re Great Eastern Hotel Pte Ltd*, namely, firstly inability to pay debts as they fall due and secondly, an excess of total liabilities over total assets, has been satisfied on the facts of this case. E

[49] It is here that the fear of dissipation of assets, as expressed by Wiraflor and Rohani, arises or could arise pending the making of the winding-up order on 2 September 2010 or any date thereafter. If this petition is struck out, the directors (having recovered control of Bio Science from the receiver and manager as per the court order discharging the receiver and manager) could lay their hands on the balance from the surplus of proceeds of sale. Nothing stops the directors from freely dealing with the proceeds to satisfy the 'shareholders loan' or to pay some of the creditors of Bio Science in preference or to the exclusion of others. This court should not stand aside and allow this possibility, which is not remote at all, to materialize. F G H

[50] All creditors of Bio Science must be protected and the court should ensure an orderly settlement of debts and dissolution of Bio Science since it has now been established on the facts that the very objective of the Bio Science's existence is spent and the I

A only landed asset it possessed has been sold by the receiver and manager. What then remained was only the surplus funds in the hands of the receiver and manager, and that too very likely for a limited time, unless this court acts to preserve the same for the benefit of all creditors of Bio Science.

B

[51] The final question - must a statutory demand (s. 218(2)(a)) be necessarily issued in all cases where s. 218(1)(e) (that is, 'the company is unable to pay it debts') is relied on as the sole basis for the winding-up petition?

C

[52] Wiraflor had issued a statutory demand, as highlighted earlier, before the petition was presented in court here. However in the case of Rohani, it is contended by Bio Science that there was no formal demand and that disqualified Rohani to be considered or deemed as a 'creditor' of Bio Science.

D

[53] Counsel for Rohani responded to this contention by stating that Rohani was not relying on the statutory presumption afforded by s. 218(1)(e) but on the fact that she had been positively acknowledged to be a creditor of Bio Science coupled with the

E fact that Bio Science admittedly was insolvent. (Both these issues have been addressed by me earlier and my holdings thereto were in favour of Rohani's position on those issues.) There is no doubt that on the evidence before this court that there was in existence a 'debtor-creditor' relationship as between Bio Science and Rohani

F and that Bio Science is not currently a solvent company. Do we then still need to import or call on the statutory presumption for assistance to ground the fact of the inability of Bio Science to meet its outstanding liability on the loan to Rohani?

G **[54]** I hold that the winding-up court can find a company unable to pay its debt from all the circumstances of the case before it and not necessarily just because a statutory notice served pursuant to s. 218(2)(a) (in a formal or non formal manner) remained unanswered.

H

[55] A closer reading of s. 218(2) in its entirety show that there are three distinct modes in which the 'inability to pay debts' can be deemed to have arisen:

I

s. 218(2)(a) & (b) - are some events which would give rise to a presumption which can be availed of, while

s. 218(2)(c) - is a separate or distinct basis for such conclusion to be arrived at by the Court without reverting to the 'presumption'

Section 218(2)(c) reads:

...

...

or

(c) it is proved to the satisfaction of the Court that the company is unable to pay its debt; and in determining whether a company is unable to pay its debts the Court should take into account the contingent and prospective liabilities of the company.

[56] To particularly take note here is the word 'or' found between s. 218(2)(b) and (c) meaning each of the limbs has to be read disjunctively. The criteria in 218(2)(c) is consistent with or parallels the 'bottom line' or 'theoretical' test (as postulated in *Re Great Eastern Hotel (Pte) Ltd* [1988] 1 LNS 198) namely, whether on a balancing of overall liabilities against the assets of the company, there is a deficit manifested. I have applied this test earlier in my decision in coming to my conclusion that Bio Science is not solvent, that is it is unable to meet in full its liabilities overall.

[57] I am fortified in holding that the failure to send a statutory notice is not fatal to Rohani's claimed position as a creditor on the basis of a similar conclusion reached by Abu Mansor J (as His Lordship then was) in the case of *Teck Yow Brothers Hand-Bag Trading Co v. Maharani Supermarket Sdn Bhd* [1989] 1 CLJ 258; [1989] 2 CLJ (Rep) 555 on the facts of that case where proceeds realized from a distress proceedings were not sufficient to pay all creditors. See also the judgment of Ramly Ali J (as His Lordship then was) in *Emporium Jaya (Bentong) Sdn Bhd (In Liquidation) v. Emporium Jaya (Jerantut) Sdn Bhd* [2002] 3 CLJ 10 to the same effect on the necessity for the statutory notice if all other indications are that the company is unable to meet its debts.

There in the two cases referred above it was held that sub-ss. (a), (b) and (c) of s. 218(2) was mutually exclusive and a company could be wound-up relying on any one of (a), (b) and (c) to show that the company is unable to pay its debts.

Conclusion

[58] As observed by VC George J (as His Lordship then was) in *Hongkong And Shanghai Banking Corporation Ltd v. Kemajuan Bersatu Enterprise Sdn Bhd* [1992] 1 LNS 26:

> s. 231 of the Act confers on the Court an unfettered discretionary power but that power must be exercised in a proper judicial manner. In the proper exercise of its discretion the Court must be satisfied that ultimately the Court is likely to make the Winding-Up Order sought in the Petition.

[59] The power to appoint can be exercised any time after presentation of a winding-up petition based on the degree of urgency established by the petitioning creditor and also having regard to the balance of convenience namely to maintain the *status quo* and prevent prejudice to contesting parties. The need to protect assets (or what is remaining of it) of the company pending the making of the winding up order has also been established by Wiraflor and Rohani before me.

[60] I am also conscious that, in any event, the threshold test for appointment of provisional liquidator is that the court must be satisfied that 'ultimately the court is likely to make the winding-up order' sought for in the petition.

[61] I am satisfied all these principal criteria have been met.

[62] Having found:

(1) that both Wiraflor and Rohani are indeed creditors of Bio Science; and

(2) that Bio Science is not solvent

the basic grounds of Bio Science's application to strike out the Petition failed, and I accordingly dismissed that application.

[63] Having found as above that both Wiraflor and Rohani are creditors of Bio Science, also that Bio Science is not solvent and taking into further consideration:

(i) that there is an urgency in the particular circumstances of this case (the receiver and manager was about to relinquish control of excess funds in their hands to Bio Science), and

(ii) that this winding-up court had a duty to maintain the *status quo* and to preserve assets in the larger interest of all creditors generally of a company against whom a petition to wind up has been presented on the grounds that it is unable to pay its debts,

[64] I held that both Wiraflor's and Rohani's application to appoint provisional liquidator pending hearing and disposal of the winding-up petition on 2 September 2010 had been more than adequately made out and therefore succeeded.

[65] I was also convinced that Wiraflor's and Rohani's application was not brought for any collateral purpose or to put pressure for settlement of their debts. I find there was demonstrated in the said applications a genuine concern for the overall body of creditors and for a proper and orderly conduct of the disbursement of the remaining assets of Bio Science (the balance of the proceeds) after the exit of the receiver and manager.

[66] I was satisfied on the totality of the evidence before me that a provisional liquidator ought to be appointed in this winding-up petition in the circumstances pending the hearing and disposal of the winding-up petition proper on 2 September 2010.

[67] I then invited counsel to address me on the specific orders and directions that I had to make on encl. 5 and on costs. I went on to make an additional order enabling the provisional liquidator to receive and hold all monies held on account of Bio Science or which properly belong to Bio Science including but not limited to such monies then being held by the receiver and manager of Bio Science. A similar direction was issued to the receiver and manager, (through his counsel who was present holding a watching brief for him at the hearing of these applications) to transmit or release forthwith such monies as were then being held by the receiver and manager, to the provisional liquidator appointed by this court.